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July 9, 1986

VIA HAND DELIVERY

Ms. Elaine B. Goldsmith
Clerk of the Court
United States Court of Appeals
for the Second Circuit
Room 1705
United States Courthouse
Foley Square
New York, New York 10007



Re: Universal City Studios, Inc. v. Nintendo Co., Ltd.,
Docket Nos. 86-7099, Calendar No. 1335
(Nintendo's Cross-Appeal) (argued June 16, 1986)

Dear Ms. Goldsmith:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, this letter is written on behalf of Appellees-Cross-Appellants, Nintendo Co., Ltd. and Nintendo of America Inc. to bring to the Court's attention the decisions in Coleco Industries, Inc. v. Universal City Studios, Inc., 84 Civ. 2596 (RWS) (S.D.N.Y. January 13, 1986 and June 16, 1986) (copies of which are annexed as Exhibits A and B), a litigation about which the Court inquired during oral argument of this appeal. As represented to the Court, the Coleco litigation is related to the Nintendo litigation insofar as both involve the issue of Universal's right to retain royalties it received from Coleco on sales of Donkey Kong products.

In the Nintendo litigation, Nintendo asserted counterclaims against Universal to recover, inter alia, an amount equal to the royalties which Nintendo's licensees, Coleco, Atari and Ruby-Spears,

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paid to Universal. Nintendo based its claim, alternatively, on grounds of unjust enrichment or tortious interference with contract. After trial, Judge Sweet awarded Nintendo damages for Universal's bad faith interference with certain licensees, but dismissed Nintendo's counterclaims for unjust enrichment and tortious interference with the Coleco, Atari and Ruby-Spears licenses. This dismissal is the subject of Nintendo's present cross-appeal.

Coleco brought its action against Universal shortly after Nintendo was awarded summary judgment in the Nintendo litigation dismissing Universal's trademark claims. Coleco sought to recover the royalties it paid to Universal for the right to market Donkey Kong products, claiming that Universal had defrauded and economically coerced it into paying the royalties. Coleco's action lay dormant until judgment was entered on Nintendo's counterclaims. Coleco then moved for summary judgment arguing that Judge Sweet's finding of Universal's bad faith in the Nintendo litigation collaterally estopped Universal from denying its fraud. On January 13, 1986, Judge Sweet denied Coleco's motion for summary judgment, holding that Coleco had adopted an impermissible "wait and see" attitude and was improperly attempting to reap a collateral estoppel benefit. Judge Sweet also held that Coleco could not collaterally estop Universal because the issues involved in the Nintendo litigation were not the same as those in the Coleco action. Judge Sweet noted, among other things, that Coleco may have entered into the Donkey Kong royalty agreement with Universal for a host of business reasons other than Universal's representations about its alleged rights to Donkey Kong. See Opinion attached hereto as Exhibit A.

Universal then asserted a counterclaim in interpleader in the Coleco litigation joining Nintendo Co., Ltd. and Nintendo of America Inc. in that action. Universal claimed that should Nintendo's cross-appeal in the Nintendo litigation be successful, Universal could be subject to double liability for the royalties it obtained on Donkey Kong products. Nintendo moved to dismiss Universal's counterclaim in interpleader. On June 16, 1986, Judge Sweet granted Nintendo's motion to dismiss, finding that Nintendo had suffered undue prejudice because of Universal's failure to join Coleco in the Nintendo litigation and its delay in asserting interpleader. Judge Sweet further found that there was no case or controversy presented by the interpleader, since, pursuant to final judgment, Nintendo's counterclaims seeking a recovery of the Coleco royalties had been dismissed. See Opinion attached hereto as Exhibit B. The dismissal is without prejudice to renewal of the

interpleader by Universal should Nintendo succeed on its cross-appeal.

In sum, it is undisputed that Universal has collected over \$4.7 million in royalties based on the sale of Donkey Kong products. In its lawsuit, Coleco seeks to recover these royalties asserting claims for fraud and economic coercion; however Judge Sweet ruled that Coleco was not entitled to summary judgment on these claims. Nintendo seeks recovery from Universal of an amount equal to the royalties Universal was paid by Coleco and two other licensees, Atari and Ruby-Spears, for tortious interference with contract or unjust enrichment. Judge Sweet recognized the theoretical right of a plaintiff to recover in such circumstances, but dismissed these counterclaims because of what Nintendo claims are legal and factual errors. In its cross-appeal Nintendo seeks reversal of these errors and a remand for further proceedings on these counterclaims before Judge Sweet.

If Judge Sweet's Determinations on Nintendo's
Cross-Appeal Are Affirmed:

1. If Coleco is unsuccessful in its attempt to recover from Universal, as seems probable based on Judge Sweet's summary judgement opinion (Exhibit A), Universal would retain the funds.

If Judge Sweet's Determinations on Nintendo's
Cross-Appeal Are Reversed and Remanded:

1. If Coleco recovers from Universal, Universal will no longer be unjustly enriched with respect to those funds; Nintendo's action for tortious interference would, however, remain with the amount of damages to be determined by Judge Sweet, an issue which he did not reach because of his dismissal of this claim.
2. If Coleco is unsuccessful and Universal retains the funds, Nintendo could recover, alternatively, for unjust enrichment or tortious interference.

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3. If Universal refiles its interpleader action and Judge Sweet allows it to stand, or if this action were consolidated with Coleco on remand, Judge Sweet would determine Coleco's claims and Nintendo's claims in the same action. Universal would be entitled to retain all or some portion of the funds only if it were successful in defeating all of the claims of Nintendo and Coleco.

Copies of this letter are enclosed for the panel's reference.

Respectfully yours,


John J. Kirby, Jr.

JJK:tnr
Enclosures

cc: Michael W. Schwartz, Esq.